

JOHN R. ERICKSON

IBLA 81-784

Decided August 25, 1981

Appeal from decision of California State Office, Bureau of Land Management, declaring unpatented mining claims and tunnel site abandoned and void. CA MC 49574 through CA MC 49576.

Affirmed in part; vacated in part and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year following the calendar year in which the claim was recorded with BLM. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not filed because it became lost in the mail the loss must be borne by the claimant.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Tunnel Sites

The failure of the owner of a tunnel site claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976), to file an annual notice of intention to hold the tunnel site, is a curable defect, and the tunnel site may not be deemed to have been

abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: John R. Erickson, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

John R. Erickson has appealed from the California State Office, Bureau of Land Management (BLM), decision dated June 1, 1981, which declared the unpatented Cabin Flat and Mocking Bird lode mining claims, CA MC 49574 and CA MC 49575, and the Cabin Flat tunnel site, CA MC 49576, abandoned and void because evidence of assessment work or notice of intent to hold, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2-1, was not filed with BLM on or before December 30, 1980.

Appellant alleges that proof of labor has been filed every year with the County Recorder of Shasta County, California, and that the required proof was mailed to BLM in August 1980. He cannot explain why BLM did not receive the document, unless it was lost by the Postal Service. With the appeal, he submitted a copy of the proof of labor he says was recorded August 20, 1980, in Book 1749 at page 599, Shasta County Records. However, the proof of labor submitted bears a signature date of August 28, 1980.

[1] Section 314 of FLPMA, supra, and the implementing regulations, 43 CFR 3833.2-1(a) and 3833.4, require that evidence of assessment work or notice of intent to hold be filed with the proper office of BLM each year within the specified time limits, under penalty of a conclusive presumption that the claim has been abandoned if the document is not timely or properly filed for recordation with BLM.

Despite appellant's statement that the document was properly and timely mailed, the regulations define "file" to mean "being received and date stamped by the proper BLM office," 43 CFR 3833.1-2(a). Thus, even if the mailing were prevented by Postal Service error from reaching the BLM office, that fact would not excuse appellant's failure to comply with the cited regulations. Glenn D. Graham, 55 IBLA 39 (1981); Everett Yount, 46 IBLA 74 (1980); James E. Yates, 42 IBLA 391 (1979). The Board has repeatedly held that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility and bear the consequence of loss or untimely delivery of his filings. Edward P. Murphy, 48 IBLA 211 (1980); Everett Yount, supra; James E. Yates, supra; Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979). Filing is accomplished only when a document is delivered to and received by the proper BLM office. Depositing a document in the mail does not constitute filing. 43 CFR 1821.2-2(f). BLM correctly declared the lode mining claims abandoned and void when no proof of

labor or notice of intent to hold was received on or before December 30, 1980.

As to the Cabin Flat tunnel site claim, CA MC 49576, the BLM decision is not correct. There is no statutory requirement for filing a proof of labor or notice of intent to hold for tunnel site claims. As was pointed out in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), FLPMA must be read as requiring the filing only of a notice of location for millsite and tunnel site claims. It is clear that the Department's regulations require the filing of a notice of intent to hold millsite and tunnel site claims, see 43 CFR 3833.2-1(d). BLM has no record that a notice of intent to hold was filed in 1980 for this tunnel site claim. In Feldslite, supra, the Board noted that there is a difference between the consequences which flow from failure to comply with an express statutory requirement and one which is purely regulatory. The Board cannot waive failure to comply, both punctually and punctiliously, with statutory requirements. Lynn Keith, 53 IBLA 92, 88 I.D. 369 (1981). On the other hand, where the failure to comply is with a requirement imposed only by regulation, the deficiency is subject to curative action. Mrs. Otis Teaford, 56 IBLA 367 (1981). This approach has received judicial approbation. Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981). The court noted:

We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 -- and not by the statute -- are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted.] [Emphasis in original.]

649 F.2d at 778.

[2] In our opinion, the logic of the Court has applicability to the case at bar. Appellant satisfied the statutory requirements for the initial recordation of the unpatented tunnel site claim. Accordingly, we hold that upon failure of a tunnel site claimant to file an annual notice of intent to hold, BLM should notify the owner of the claim of this deficiency and afford the claimant a period of time within which to comply with the regulatory requirement. Should compliance not then occur, the tunnel site claim may properly be declared abandoned and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the lode mining claims, and is reversed as to the tunnel site claim. The case file is remanded for further action not inconsistent herewith.

Douglas E. Henriques  
Administrative Judge

We concur:

Bernard V. Parrette  
Chief Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

